Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-743

In the Supreme Court of the United States

OCTOBER TERM, 1988

BOBBY JOE WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
MERVYN HAMBURG
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

QUESTIONS PRESENTED

1. Whether a state police officer conducted a valid search of petitioner's car incident to his arrest for driving with a suspended license when at the time of the search petitioner had been handcuffed and placed in the back seat of the officer's police car.

2. Whether the police officer's warrantless search of the trunk of petitioner's car was supported by probable cause.

3. Whether petitioner's arrest for driving with a suspended license was unlawful because it was a mere pretext for the police officer's conducting a search of petitioner's car for evidence of illegal drugs.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Gustafson v. *Florida*, 414 U.S. 260 (1974)	5
New York v. *Belton*, 453 U.S. 454 (1981)	3, 4
United States v. *Vasey*, 834 F.2d 782 (9th Cir. 1987)	5

Statutes:

18 U.S.C. 924(c)	1
21 U.S.C. 841(a)(1)	1

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-743

BOBBY JOE WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 853 F.2d 869.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1988. The petition for a writ of certiorari was filed on October 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following petitioner's entry of a conditional plea of guilty in the United States District Court for the Northern District of Georgia, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c). Peti-

tioner was sentenced to consecutive terms of ten and five years' imprisonment on the two counts. He was also sentenced to a five-year special parole term on the drug count. The court of appeals affirmed.

1. The evidence presented at the hearing on petitioner's motion to suppress established that on March 1, 1987, Michael Ralston, a Georgia state police officer, stopped petitioner for speeding on an interstate highway. Officer Ralston obtained from petitioner his Tennessee driver's license and the Florida registration (in the name of a third party) for the car that he was driving. The officer observed several items on the front seat of petitioner's car, including a short white straw covered with a powdery substance, two brown paper bags filled with tissues, and what appeared to be an Anacin container. The officer then returned to his own car and radioed police headquarters to determine the status of petitioner's license and motor vehicle registration. Upon learning that petitioner's license had been suspended, the officer arrested petitioner. Pet. App. 2a-3a.

The officer next conducted a pat-down search of petitioner and discovered next to petitioner's left leg a .22 caliber revolver, which the officer seized. The officer then handcuffed petitioner and placed him in the back seat of the patrol car before searching the passenger compartment of petitioner's car. The officer discovered white powder, which he concluded was cocaine, inside the Anacin container located on the front seat. The officer then opened the trunk of the car, in which he found an outboard motor gasoline can containing several packages of what appeared to be cocaine. Pet. App. 3a.

Adopting the magistrate's findings and recommendations (see Pet. App. 40a-51a), the district court denied petitioner's motion to suppress the evidence discovered subsequent to his arrest (*id.* at 52a-53a). The court rejected

petitioner's claim that Officer Ralston's initial stop of petitioner's vehicle was unlawful because it was "a pretense to investigate for a possible drug violation" (*id.* at 46a). The court also concluded that petitioner's custodial arrest for driving with a suspended license was authorized by applicable Georgia law (*id.* at 46a-48a). Finally, the court concluded that the officer's searches of petitioner's person and car were likewise valid. According to the court, the search of the passenger compartment was a valid search incident to petitioner's arrest and the subsequent search of the trunk of the car was valid because it was supported by probable cause (*id.* at 48a-51a).

The court of appeals affirmed (Pet. App. 1a-17a). The court rejected petitioner's claim that his arrest for driving with a suspended license was a mere pretext to enable the officer to search for evidence of illegal drugs. The court held that Georgia law authorized petitioner's custodial arrest for driving with a suspended license (*id.* at 5a-13a). The court also concluded that the arrest was not invalid on pretextual grounds because, regardless of the arresting officer's actual motive, evidence regarding his department's normal policies and practices established that a reasonable officer would have arrested petitioner for driving with a suspended license, even absent any reason to conduct an unrelated search for narcotics (*id.* at 14a-17a).

ARGUMENT

1. Contrary to petitioner's claim (Pet. 5-9), the search of the passenger compartment of his car was a valid search incident to his arrest even though it occurred after petitioner had been handcuffed and placed in the back seat of the arresting officer's patrol car. In *New York* v. *Belton*, 453 U.S. 454, 460 (1981) (footnote omitted), this Court squarely held that where, as in this case, "a policeman has

made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Not only did the Court fail to qualify its ruling in the manner now suggested by petitioner, but such a qualification would be inconsistent with the Court's rationale in *Belton* to use a "generalization" to "establish the workable rule this category of cases requires" (*id.* at 460). Because the search in this case occurred just moments after the arrest, it was plainly "contemporaneous" with the arrest and therefore the very type of search permitted under *Belton*.[1]

In any event, review of petitioner's claim is not warranted because he failed to raise it before the court of appeals. With respect to the car search, petitioner made only the argument that the search incident to his arrest was invalid because it "was not justi[fied] by the pretextual arrest on a traffic violation of [petitioner]" (Pet. C.A. Br. 24-26). The court of appeals correctly rejected that argument (Pet. App. 6a n.3). Petitioner did not make the wholly distinct argument, which he now raises for the first time, that the search was invalid because at the time of the search petitioner had been handcuffed and placed in the back seat of the patrol car.[2] Having failed to appeal the

---

[1] There is no merit to petitioner's claim (Pet. 7) that the search was not contemporaneous with the arrest because it was conducted "several minutes" after the arrest. The precise amount of delay between the arrest and the search is not clear from the record – because petitioner did not raise this issue in either the court of appeals or the district court – but, in any event, a delay only of "several minutes" is not sufficient to deprive a search of the required contemporaneity.

[2] Nor, as the court of appeals explained (Pet. App. 6a-7a n.3), did petitioner attempt to distinguish *Belton* on the ground that "the search in *Belton* took place after the police officer arrested the occupants for possession of marijuana, not for a traffic offense." The court of appeals accordingly "ha[d] no occasion to consider whether the *Belton*

district court's ruling on that ground, petitioner cannot now urge this Court's review of the question in the first instance.[3]

2. For similar reasons, review is not warranted of petitioner's contention (Pet. 10-12) that the search of the trunk of the car was invalid because it was not supported by probable cause. The district court's findings concerning the facts known to the officer at the time of the search—especially the discovery of the revolver on petitioner's person and the cocaine found in the Anacin container (see Pet. App. 50a)—show that the search of the trunk was supported by probable cause. In any event, petitioner failed to appeal that aspect of the district court's ruling to the court of appeals.

3. Finally, further review is not warranted of petitioner's claim (Pet. 13) that his arrest for driving with a suspended license was a mere pretext for the subsequent

---

rule justifies the search of an automobile incident to a lawful custodial arrest for a 'mere' traffic offense" (Pet. App. 7a n.3). See *Gustafson* v. *Florida*, 414 U.S. 260, 266 (1974) ("We hold, therefore, that upon arresting petitioner for the offense of driving his automobile without possession of a valid operator's license, and taking him into custody, [the police officer] was entitled to make a full search of petitioner's person incident to that lawful arrest.").

[3] For this same reason, petitioner cannot of course validly claim that this case provides an occasion to review what petitioner characterizes as "conflicting interpretations" of *Belton* by various courts of appeals (see Pet. 8-9). We note, however, that even if he had made the argument below that he makes in this Court, and even if the court of appeals had rejected that argument, the decision of the court of appeals would not have conflicted with the decision of the Ninth Circuit in *United States* v. *Vasey*, 834 F.2d 782 (1987). The search challenged in *Vasey* was conducted 30 to 45 minutes after the arrest, which is why the Ninth Circuit concluded that the search "was not conducted contemporaneously with the arrest" (*id.* at 787). There is no indication that the search challenged in this case was similarly delayed.

search of his car for evidence of illegal drugs. Petitioner does not contend that the officer's initial stop of his car for speeding was illegal (see *ibid.*; Pet. App. 4a). Nor does petitioner challenge the court of appeals' ruling that the appropriate judicial inquiry is whether a reasonable officer would have made the arrest absent an illegitimate motivation (see Pet. 17-18; Pet. App. 14a). The thrust of petitioner's argument is instead that applicable Georgia law did not authorize his arrest for driving with a suspended license (see Pet. 18-21) and that "[s]ound public policy" supports his interpretation of Georgia law (see *id.* at 21).

As the court of appeals explained, however, the state statute upon which petitioner relies "permits the issuance of a citation and the deposit of a driver's license as an alternative to custodial arrest and incarceration, while leaving such arrest and incarceration as a viable procedure" (Pet. App. 10a). Indeed, as the court further explained, "[i]t would be most odd if Georgia police officers could accept a *suspended* operator license in lieu of detaining a driver and could give the driver a receipt which was the equivalent of a *valid* operator license in permitting the driver to use a motor vehicle in Georgia. Placing the driver under arrest and detaining him for a short time pending an appearance before a magistrate or a posting of bond seems a reasonable method of charging the driver with the offense of driving with a suspended license and removing the driver from the road." Pet. App. 17a (emphasis in original).

Finally, petitioner's pretext claim was properly rejected because, as the court of appeals also found (Pet. App. 16a), "[n]ot only was there an absence of evidence indicating that [Officer] Ralston's arrest of [petitioner] was pretextual; Ralston testified that the arrest conformed to normal policies and practices of dealing with persons driving with a suspended license, even those persons not

suspected of drug offenses." Because petitioner "offered no evidence suggesting that this was not the way the department operated, * * * the district court was entitled to credit [Officer] Ralston's testimony" (*ibid.* (footnote omitted)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
MERVYN HAMBURG
Attorney

JANUARY 1989

U.S. GOVERNMENT PRINTING OFFICE 1988—241 699 00043